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IN THE COURT OF APPEALS OF INDIANA

TOWN OF CHESTERTON ADVISORY PLAN COMMISSION,	)	
Appellant-Respondent,	)	
vs.	)	No. 64A04-0712-CV-732
ROGER W. ABRAHAM, JR. and LISA ABRAHAM; KAM C. CHAN; ANDY B. COBB and GINA M. COBB; LARRY GREEN and LINDA GREEN; BRIAN HICKEY; JOSEPH E. JAMROK and MARY K. JAMROK; JEFFREY S. SOPKO and JENEEN S. SOPKO; JOHN F. SWIBES and BRENDA M. BURNS-SWIBES; BRIAN H. TEBROCK; ROBERT J. TRCKA and SUSAN K. TRCKA; and DAVID WAGNER and KAREN WAGNER,	)	
Appellees-Petitioners.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Mary J. Harper, Special Judge
Cause No. 64D02-0604-PL-3309

December 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

The Town of Chesterton Advisory Plan Commission (the "Commission") appeals the trial court's issuance of a Writ of Certiorari to the petitioners (collectively, the "Neighbors") and the trial court's Order vacating the Commission's approval of the secondary plat for Rose Hill Estates Planned Unit Development ("Rose Hill PUD") Lot 73. For our review, the Commission raises two issues: 1) whether the trial court erred in granting the Neighbors' petition for writ of certiorari; and 2) whether the trial court erred in vacating the secondary plat. In addition, we address the following issue raised by the Neighbors: whether the Commission has standing to appeal the trial court's orders. Concluding that the Commission has standing to bring this appeal and that the Neighbors' petition was untimely, we reverse the trial court's order vacating the Commission's secondary plat approval for Lot 73.

Facts and Procedural History

In 2002, Rose Peer, Barbara Borg, and Anne Siewart petitioned the Commission for approval of the Rose Hill PUD. On April 18, 2002, the Commission conducted a concept review of the Rose Hill PUD at a public meeting. On June 20, 2002, a proposed ordinance to establish the Rose Hill PUD was presented to the Commission and set for a public hearing on July 18, 2002. On July 5, 2002, notice of the July 18 hearing was published in the Chesterton

Tribune and notice was mailed to persons owning property within 300 feet of the property that was to become the Rose Hill PUD. No remonstrators attended the public hearing on July 18, 2002, and the Commission voted unanimously to forward the proposed Rose Hill PUD to the Chesterton Town Council. On August 12, 2002, the Chesterton Town Council adopted Ordinance 2002-21, establishing the Rose Hill PUD. On August 15, 2002, the Commission approved the primary plat for the Rose Hill PUD based upon drawings dated July 1, 2002, showing seventy-three lots to be developed in four phases.

The initial phases of development began to take place as home buyers began to purchase lots and work with builders to build new residential homes on lots one through seventy-two. In 2005, a more detailed drawing of Lot 73 was submitted to the Commission. On February 22, 2006, a secondary plat for Rose Hill PUD phase four was presented at a Commission meeting. On March 16, 2006, the Commission approved the secondary plat. No notice was sent to any of the Neighbors prior to either the February 22, 2006, or March 16, 2006, meetings.

On April 17, 2006, the Neighbors filed a Petition for Writ of Certiorari with the trial court naming Rose Hill Estates II, LLC and the Commission as respondents. The Petition alleges deficiencies with the primary plat that was approved in 2002, specifically that the drawings for Lot 73 were not sufficiently detailed as required by the Town of Chesterton's Subdivision Control Ordinance. The Neighbors asserted that, because of these deficiencies, the plat referred to as a "secondary plat" by the Commission and the Rose Hill PUD was actually an amended primary plat, which required notice and a public hearing prior to

approval. The trial court issued an Order to Show Cause, and then an amended Order to Show Cause on April 27, 2006, directing the Commission to show why the writ should not be issued. On June 8, 2006, the Commission responded by arguing that the Neighbors' Petition essentially sought impermissibly late review of the primary plat and mischaracterized the secondary plat as an amended plat. On December 6, 2006, the trial court heard oral argument on the Neighbors' Petition and took the matter under advisement. On December 18, 2006, the trial court issued a Writ of Certiorari requiring the Commission to provide the record relevant to its approval of the plat for Lot 73.

On June 11, 2007, the trial court held a hearing on the merits of the Petition. On November 9, 2007, the trial court entered its Order with findings of fact and conclusions of law, vacating the Commission's secondary plat approval.

The Commission now appeals, but Rose Hill Estates II, LLC, does not join the appeal. Additional facts will be provided as necessary.

Discussion and Decision

I. Standing

We address first the Neighbors' argument regarding the Commission's standing to pursue this appeal. The Neighbors contend that because the Commission is a local government agency, it does not have a stake in the outcome of this litigation, and therefore does not have standing. The Commission responds that because it was treated as a party in the trial court proceedings, it does have standing to appeal the trial court's order vacating its

approval of the plat.[1]

A. Standing Based on Commission's Party-Status In the Trial Court

Indiana Appellate Rule 17(A) states: "A party of record in the trial court or Administrative Agency shall be a party on appeal,"[2] and Indiana Code section 34-56-1-1 states: "Appeals may be taken by either party from all final judgments in circuit courts or superior courts." The Commission was a party of record in the trial court, and it is therefore a party to this appeal. See AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc., 816 N.E.2d 40, 44 n.1 (Ind. Ct. App. 2004) (denying a party's motion to strike an interested party brief, as "Ind. Appellate Rule 17 clearly states that a party of record in the trial court shall be a party on appeal. Since AFC was a party of record in the trial court, we hold that AFC can be a party on appeal"); State ex rel. Dillon v. Shepp, 165 Ind. App. 453, 455-56, 332 N.E.2d 815, 817 (1975) (holding that where a party was a named defendant in the trial court, that party was a party upon appeal and was entitled to service of all filings on appeal).

Our supreme court has explicitly rejected the argument that a party in the trial court

[1] We note that although research has disclosed no case explicitly holding that a local plan commission has standing to appeal a trial court's reversal of the commission's decision, numerous decisions have addressed a commission's appeal of such a reversal. See Fulton County Advisory Plan Comm'n v. Groninger, 810 N.E.2d 704 (Ind. 2004); Kosciusko County Area Plan Comm'n v. 1st Source Bank, 804 N.E.2d 1194 (Ind. Ct. App. 2004); Johnson County Plan Comm'n v. Tinkle, 748 N.E.2d 417 (Ind. Ct. App. 2001); cf. Area Plan Comm'n of Evansville and Vanderburgh County v. Wilson, 701 N.E.2d 856 (Ind. Ct. App. 1998) (commission appealing trial court's decision that a portion of the city zoning ordinance was unconstitutional), trans. denied, cert. denied, 528 U.S. 1019 (1999). These cases demonstrate that the commission's standing to appeal a reversal of its decision is generally accepted. See Filter Specialists, Inc. v. Brooks, 879 N.E.2d 558, 570 (Ind. Ct. App. 2007) (citing decisions in which the Indiana Civil Rights Commission or a local commission was a party and recognizing that their "presence . . . as a party is generally accepted." Many of the reasons discussed in Filter Specialists as justifying a local civil rights commission's standing are also applicable to a local plan commission's standing), trans. granted.

[2] For this reason, the developer, Rose Hill Estates II, LLC, is a party to this appeal by operation of Appellate Rule 17(A) even though it did not file an appellate brief. See Porter Dev., LLC v. First Nat'l Bank

was not a real party in interest and therefore should not be permitted to appeal. See N. Ind. Pub. Serv. Co. v. Minniefield, 823 N.E.2d 273, 273 (Ind. 2005) (Order) ("[The appellant] asks the Court to strike the Response of [the appellees] because, [the appellant] argues, they are not 'real parties in interest' and did not participate in the appeal when it was before the Court of Appeals. However, Ind. Appellate Rule 17(A) definitively states in relevant part, 'A party of record in the trial court . . . shall be a party on appeal,' and it is undisputed that [the appellees] were parties in the litigation before the trial court.").

The claim on which the appellees joined the Commission in the trial court is the precise claim appealed by the Commission, and it appears that the Commission would be required to take remedial action, i.e., vacate its plat approval and eventually hold a hearing, as a result of the trial court's decision. See Knight v. Alaska, 14 F.3d 1534, 1555-56 (11th Cir. 1994) ("Because it is not generally required that a defendant have any particular 'standing' in order to be sued in a trial court, a defendant ordinarily has standing to appeal any ruling on the plaintiff's cause of action that is adverse to the defendant's interests. . . . The judgment is adverse to the [defendants] insofar as it orders them to take various remedial measures."); Allstate Ins. Co. v. Hayes, 499 N.W.2d 743, 749 (Mich. 1993) ("By naming Keillor as an interested party, Allstate has consented to a determination of the coverage question. Allstate cannot complain about that determination on the basis of a lack of [Keiller's] standing."). As the Commission has an interest in the outcome of this litigation, it has standing to pursue this appeal. Cf. Ad Craft, Inc. v. Area Plan Comm'n of Evansville and Vanderburgh County, 716 N.E.2d 6, 15 (Ind. Ct. App. 1999) (recognizing that the area

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of Valparaiso, 866 N.E.2d 775, 775 n.1 (Ind. 2007).

planning commission "certainly had a substantial interest in enforcing the relevant zoning regulations and in determining whether it should revoke [the appellant's] permit and grant a permit to [another party]").

B. Standing Conferred By Statute

Indiana statute also confers standing on the Commission to pursue this appeal. Indiana Code section 36-7-4-1016 indicates that decisions rendered by the plan commission regarding plat approval[3] "may be reviewed by certiorari procedure in the same manner as that provided for the appeal of a decision of the board of zoning appeals." Under Indiana Code section 36-7-4-1011, "An appeal may be taken to the court of appeals from the final judgment of the court reversing, affirming, or modifying the decision of the board of zoning appeals." Under many circumstances, there will be no party other than the plan commission or board of zoning appeals[4] to appeal a reversal. By permitting appeals from the reversal of a decision of the plan commission, the legislature has conferred standing on the Commission.

[3] "The primary approval or disproval of a plat by the plan commission . . . is a final decision of the plan commission that may be reviewed as provided by section 1016 of this chapter." Ind. Code § 36-7-4-708(d); see also Ind. Code § 36-7-4-1406(b) ("[A] decision of the plan commission approving or disapproving a development plan or a decision made under section 1405(b) of this chapter is a final decision of the plan commission that may be reviewed only as provided in section 1016 of this chapter.").

[4] We also note that it is commonplace for the board of zoning appeals to appeal a trial court's reversal of its decision. Hamilton County Plan Comm'n v. Nieten, 876 N.E.2d 355 (Ind. Ct. App. 2007), trans. denied; Board of Zoning Appeals of Porter County v. Lake County Trust Co., 783 N.E.2d 382 (Ind. Ct. App. 2003) (BZA appealing trial court's denial of its motion to dismiss), trans. denied; Gary Bd. of Zoning Appeals v. Eldridge, 774 N.E.2d 579 (Ind. Ct. App. 2002), trans. denied; Kosciusko County Bd. of Zoning Appeals v. Smith, 724 N.E.2d 279 (Ind. Ct. App. 2000), trans. denied; Ripley County Bd. of Zoning Appeals v. Rumpke of Ind., Inc., 663 N.E.2d 198 (Ind. Ct. App. 1996), trans. denied; Bd. of Zoning Appeals of Evansville and Vanderburgh County v. Kempf, 656 N.E.2d 1201 (Ind. Ct. App. 1995), trans. denied; see also 600 Land, Inc. v. Metro. Bd. of Zoning Appeals of Marion County, 889 N.E.2d 305, 307 (Ind. 2008) (supreme court granting BZA's petition to transfer after court of appeals reversed the BZA); St. Charles Tower, Inc. v. Bd. of Zoning Appeals of Evansville-Vanderburgh County, 873 N.E.2d 598 (Ind. 2007) (same).

Further, under Indiana Code section 36-7-4-1014:

> (a) The plan commission or any enforcement official designated in the zoning ordinance may bring an action in the circuit or superior court of the county to invoke any legal, equitable, or special remedy for the enforcement of this chapter or any ordinance adopted or action taken under this chapter.
> (b) The plan commission or any enforcement official designated in the zoning ordinance may also bring an action in the circuit or superior court of the county to enforce:
>
> (1) conditions imposed under this chapter;
> (2) covenants made in connection with a subdivision plat, a development plan, or a PUD district ordinance (as defined in section 1503 of this chapter); or
> (3) commitments made in accordance with this chapter.

If the Commission has standing to bring actions in the circuit or superior court to enforce any action under this chapter, the Commission also has standing to appeal a trial court's decision vacating an action of the Commission.

C. Waiver and Invited Error

The Commission also argues that it has a right to appeal because it was a party in the trial court, named as a party by the Neighbors. Therefore, if there is any error in allowing the Commission to pursue this appeal, the Neighbors invited the error, and cannot now complain on appeal. See Witte v. Mundy ex rel. Mundy, 820 N.E.2d 128, 134 (Ind. 2005); Clearspring Twp. Of La Grange County v. Blough, 173 Ind. 15, 88 N.E. 511, 513 (1909) (recognizing that as the appellees made a party a defendant, the appellees "cannot now be heard to say that she is not a party in interest"), reh'g denied, 173 Ind. 15, 89 N.E. 369; Spangler v. Savings Loan & Trust Co., 66 Ind. App. 509, 114 N.E. 105, 107 (1916) ("[A]ppellant included [a party] as one of the parties complained of, and hence is now in no position to be heard to say that it was not a proper party defendant thereto.").

Further, the Neighbors did not object to the Commission's defense of its decision in the trial court, and therefore has waived the issue of standing. See Burcham v. Metro. Bd. of Zoning Appeals, 883 N.E.2d 204, 210 (Ind. Ct. App. 2008); Family Dev., Ltd. v. Steuben County Waste Watchers, Inc., 749 N.E.2d 1243, 1255 (Ind. Ct. App. 2001) ("Because FDL failed to challenge Waste Watchers' standing during the administrative proceedings, it has waived this issue on appeal."); In re Involuntary Termination of Parent-Child Relationship of A.K., 755 N.E.2d 1090, 1099 (Ind. Ct. App. 2001) (holding parent waived issue of whether the Guardian Ad Litem was a proper party, where parent did not object at the termination hearing); Ind. Port Comm'n v. Consol. Grain & Barge Co., 701 N.E.2d 882, 886 n.4 (Ind. Ct. App. 1998) (holding party waived issue of standing by failing to raise it in the trial court), trans. denied; Steuben County v. Nat'l Serv-All, Inc., 556 N.E.2d 1354, 1355 (Ind. Ct. App. 1990) (holding issue of a party's standing waived by the failure to raise the issue in the petitioner's writ of certiorari), trans. denied; Metro. Dev. Comm'n of Marion County v. Camplin, 153 Ind. App. 622, 624, 288 N.E.2d 569, 571 (1972) (recognizing the appellee's objection to the commission's standing "was not raised during the certiorari proceeding below nor in the Motion to Correct Errors. The alleged error, if any, has therefore been waived.").

We therefore conclude that the Commission has standing to appeal the trial court's decision and proceed to consider the merits of the Commission's appeal.

II. Writ of Certiorari

The Commission contends the trial court erred in granting the Neighbors' petition for

writ of certioriari because the petition was untimely, sought a remedy outside the scope of available relief, and made allegations that are not the subject of certiorari review.

A. Standard of Review

Indiana Code section 36-7-4-1016 provides that decisions of an area plan commission are subject to the same process of review as are local zoning decisions. See also Area Plan Comm'n, Evansville-Vanderburgh Co. v. Hatfield, 820 N.E.2d 696, 698 (Ind. Ct. App. 2005), trans. denied. Decisions of a zoning board are subject to court review by certiorari. Ind. Code § 36-7-4-1003. "A person aggrieved by a decision of a board of zoning appeals may present to the circuit or superior court in the county in which the premises are located a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of illegality." Bagnall v. Town of Beverly Shores, 726 N.E.2d 782, 785 (Ind. 2000) (citing Ind. Code § 36-7-4-1003(b)). When reviewing a decision of a board of zoning appeals, the trial court must determine if the board's decision was incorrect as a matter of law. Cook v. Adams County Plan Comm'n, 871 N.E.2d 1003, 1006 (Ind. Ct. App. 2007), trans. denied. The trial court may not conduct a trial *de novo* or substitute its decision for that of the board. Id.

When reviewing a decision of a zoning board, we are bound by the same standard of review as the trial court. S & S Enters., Inc. v. Marion County Bd. of Zoning Appeals, 788 N.E.2d 485, 489 (Ind. Ct. App. 2003), trans. denied. On appeal, however, to the extent the trial court's factual findings were based on a paper record, this court conducts its own *de novo* review of the record. See Equicor Dev., Inc. v. The Westfield-Washington Twp. Plan

Comm'n, 758 N.E.2d 34, 37 (Ind. 2001). If the trial court holds an evidentiary hearing, this court defers to the trial court to the extent its factual findings derive from the hearing. Id.

B. Timeliness of Writ

In Plan Commission for Floyd County v. Klein, 765 N.E.2d 632 (Ind. Ct. App. 2002), the plat approval process is described in pertinent part as follows:

> The provisions in the Indiana Code governing the subdivision of land contemplate a two-stage approval process consisting of primary and secondary approval. A person who desires to subdivide land must submit a written application for primary approval of the proposed plat to the local plan commission. Ind. Code § 36-7-4-703. After the application is submitted, the plan commission is to set the matter for hearing. Ind. Code §[§] 36-7-4-705 and -706. In considering an application for primary approval, the plan commission is limited to determining whether the specific requirements set out in the subdivision control ordinance have been met. If the requirements in the ordinance have been met, the plan commission must approve the plat. A plan commission's role in this regard is purely ministerial, and the commission has no discretion to deny an application that meets the requirements of the applicable subdivision control ordinance.
>
> * * *
>
> The Plan Commission may grant secondary, or final, approval of a subdivision plat without further notice or hearing once the time to petition for judicial review of the commission's grant of primary approval has expired. Ind. Code § 36-7-4-710. A person may not file a subdivision plat with the county auditor, and the plat may not be recorded, until secondary approval has been granted and the plat has been signed and certified by the official designated in the subdivision control ordinance. Id.

Id. at 640-42 (some citations omitted).

Here, the Commission approved the Rose Hill PUD primary plat on August 15, 2002. The primary plat shows Phase 4 as a single lot, Lot 73. At a public meeting prior to ordinance approval, Rose Hill PUD representatives described the PUD as being developed in four phases, with Phase 4 being "developed with restrictions of no more than 48 living units

with a maximum of 24 duplex units." App. at 125. The ordinance approved the following variance with respect to Phase 4: "In a R-1 zone there can only be one (1) single family dwelling on a lot and the variance requested is to allow multi-family dwellings on Lot 73, with no more than 24 structures housing no more than 48 dwelling units." Id. at 133. When the primary plat was approved on August 15, 2002, it was noted that "the ordinance would allow some flexibility in the development of Lot 73." Id. at 202. The primary plat was approved by unanimous vote.

The Rose Hill PUD was again before the Commission on November 17, 2005, for a site plan review of Lot 73. Several residents of Rose Hill were present and expressed concerns over the plans for Lot 73. For instance, the owner of Lot 13 stated that the developer had "made material statements to numerous neighbors about what the plans would look like and what would be there. They look at that as a verbal contract. What they see here tonight is not[h]ing like what he said." Id. at 216. The Commission noted that its role was to "make sure what is proposed in this plan, conforms to what had originally been approved in the PUD." Id. The secondary plat for Lot 73 was approved on March 16, 2006. The Neighbors filed their petition for writ of certiorari on April 17, 2006. The petition alleged:

> 7. That on August 15, 2002, the Plan Commission granted Primary Plat Approval for Rose Hill Estates Planned Unit Development based on engineering drawings dated July 1, 2002.
> 8. That in the Primary Plat Drawings dated July 1, 2002, Phase 4 a/k/a Lot 73 is shown as a large undeveloped white space consisting of 482,803 square feet or 11.08 acres containing two delineated wetlands totaling 3.37 acres.
> 9. That thereafter, Developer represented to various purchasers of the subdivided lots in Phases 1, 2 and 3 that the large Phase 4 white space was to be preserved as a "nature preserve."
> 10. That the July 1, 2002 drawings contained very little of the underlying

> information for Phase 4 (Lot 73) required by Chapter 3 "Plans and Specifications" of the Chesterton Zoning Ordinance beginning with Section 1000-37.
> 11. That the detailed supporting drawings and information required by Section 1000-37 for a primary plat approval of Phase 4 (Lot 73) were not prepared and filed with the Plan Commission until February 13, 2006 in conjunction with Developer's request for secondary plat approval for Phase 4 (Lot 73) pursuant to Section 1000-24 of the Chesterton Zoning Ordinance.
> 12. That the Petitioners individually and through their attorney attempted to bring to the attention of the Plan Commission that the requirements of a primary plat for the development of Phase 4 (Lot 73) had never been met and therefore primary plat approval could never have been given for Phase 4 (Lot 73) except as an undeveloped 11.08 acre vacant parcel consisting of 482,803 square feet or as it is shown on the February 13, 2006 drawings as a 10.0 acre parcel consisting of 435,539 square feet.
> * * *
> 16. That the Plan Commission never approved a primary plat for the development of Phase 4 (Lot 73) as detailed in the February 10, 2006 drawings, because the Plan Commission never had the documents required for primary plat approval by Section 1000-37 of the Zoning Ordinance as to Phase 4 (Lot 73).
> * * *
> 20. That it was improper abuse of discretion for the Plan Commission to refuse to schedule a public hearing on the February 10, 2006 drawings which should have been denominated a primary plat for Phase 4 (Lot 73) or an "amended primary" plat.

Id. at 30-32.

A petition for certiorari review must be presented to the trial court within thirty days of the zoning board's decision. Ind. Code § 36-7-4-1003; Town of Cedar Lake Bd. of Zoning Appeals v. Vellegas, 853 N.E.2d 123, 125 (Ind. Ct. App. 2006). Where there is a failure to comply strictly with the jurisdictional requirements of the statute providing for certiorari review, the trial court does not acquire jurisdiction of the parties or the particular case. Shipshewana Convenience Corp. v. Bd. of Zoning Appeals of LaGrange County, 656 N.E.2d 812, 813 (Ind. 1995); see also Ballman v. Duffecy, 230 Ind. 220, 228, 102 N.E.2d

646, 649 (1952) (affirming dismissal for failure to present a petition to the trial court within thirty days because the certiorari review procedure is "jurisdictional and mandatory").

The Commission contends, and we agree, that the Neighbors' petition is actually a challenge to the Commission's approval of the primary plat on August 15, 2002. The Neighbors' petition alleges that the primary plat drawings of Lot 73 approved on August 15, 2002, did not contain all the information required by the Chesterton Subdivision Control Ordinance and therefore the only approval that could have been given for Phase 4 was "as an undeveloped 11.08 acre vacant parcel . . . ." App. at 31. However, it is clear from the Commission meetings prior to primary plat approval and from the Rose Hill PUD ordinance that it was intended by Rose Hill, expected by the Commission, and allowed by the ordinance that Phase 4 would be developed in due course and that it would have up to 48 living units in no more than 24 structures. Other specifics of the development of Lot 73, such as connectivity via a system of walkways and zero lot line settings, were discussed prior to primary plat approval. The claims the Neighbors now make concerning the lack of specificity in the primary plat could have and should have been made at the time of primary plat approval in 2002.

That the secondary plat was approved in March 2006 does not revive the Neighbors' claims. In Miller v. St. Joseph County Area Bd. of Zoning Appeals, 809 N.E.2d 356 (Ind. Ct. App. 2004), we addressed the timeliness of a petition for certiorari filed within thirty days of a revised zoning order. Michael Garatoni wished to build an addition to a child care center he owned. Because Garatoni wanted to build the addition in the setback area of his property

which adjoined a residential lot owed by Robert Miller, Garatoni approached Miller and the two worked out an agreement prior to Garatoni seeking a variance from the zoning board. At a hearing on December 4, 2002, Garatoni informed the zoning board of the conditions upon which he and Miller had agreed and asked that the zoning board resolve two additional issues on which they could not agree. The zoning board granted the variance. Miller filed a motion to correct error noting several errors in the variance. The Board then held a second hearing on February 5, 2003, and revised the order to reflect what actually had been approved at the December 4 hearing. Miller then filed a motion for review on March 7, 2003, asserting that the revised order was a substantive change from the original order and asking that both orders be set aside. The trial court concluded that the revised order was issued to correct clerical errors in the first order and that Miller's motion for review was therefore filed after the thirty days allowed by statute. On appeal, we affirmed the trial court's dismissal of Miller's motion for review, holding that although some of the changes made by the revised order were substantive, Miller's challenges were not to those changes, but to the original order, and therefore could not be considered. Id. at 358-59. We also observed that "[h]ad Miller wished to challenge the ability of the Board to grant the variance in this case, he necessarily must have filed his petition for review within thirty days of the first order." Id. at 359.

Here, too, we acknowledge that the secondary plat of Lot 73 made substantive changes to the primary plat. However, it was known at the time the primary plat was approved that the 24 structures and 48 living units ultimately planned by the developer on

and allowed by the ordinance on Lot 73 were not shown on the plat. If that did not comply with the Town of Chesterton subdivision control ordinance, the time to raise the issue was within thirty days of primary plat approval. Accordingly, the Neighbors' petition, filed nearly four years after the Commission granted primary plat approval to the Rose Hill PUD, was untimely and the trial court had no jurisdiction to entertain the petition.

Conclusion

For the reasons stated above, the Commission has standing to pursue this appeal. The Neighbors' petition for writ of certiorari alleged deficiencies in the August 15, 2002, approval of the Rose Hill PUD primary plat and was required by statute to be filed within thirty days of that approval. Because it was filed after the time allowed by statute, the trial court had no jurisdiction and its order vacating the secondary plat approval is reversed.

Reversed.

BAKER, C.J., concurs.

RILEY, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

TOWN OF CHESTERTON ADVISORY PLAN COMMISSION, Appellant-Respondent, vs. ROGER W. ABRAHAM, JR. and LISA ABRAHAM; KAM C. CHAN; ANDY B. COBB and GINA M. COBB; LARRY GREEN and LINDA GREEN; BRIAN HICKEY; JOSEPH E. JAMROK and MARY K. JAMROCK; JEFFREY S. SOPKO and JENEEN S. SOPKO; JOHN F. SWIBES and BRENDA M. BURNS-SWIBES; BRIAN H. TEBROCK; ROBERT J. TRCKA And SUSAN K. TRCKA; and DAVID WAGNER and KAREN WAGNER, Appellees-Petitioners.	)	No. 64A04-0712-CV-732

Judge, Riley, dissenting with separate opinion.

I respectfully dissent. I would dismiss the appeal because the Chesterton Plan Commission does not have standing to pursue this appeal.

The Chesterton Plan Commission is a governmental agency established pursuant to Indiana Code section 36-7-4-202. Such an advisory plan commission has specific authority defined by statute. *See* I.C. § 36-7-4-401. Relevant here, its authority includes the power to "render decisions concerning and approve plats, replats, and amendments to plats of subdivisions under 700 series of this chapter." I.C. § 36-7-4-405(a)(2). Its enumerated statutory authority does not include, however, the power to petition for a writ of certiorari or

the power to appeal such writ or the judicial review that follows.

A writ of certiorari is a writ issued to direct a lower tribunal to "deliver the record in the case for review." BLACK'S LAW DICTIONARY 220 (7th Ed. 1999). While a recommendation by a plan commission is not subject to review by a writ of certiorari, a decision made by a plan commission is. *City Plan Comm'n of City of Hammond, Lake County v. Pielet*, 167 Ind. App. 324, 327-38, 338 N.E.2d 648, 650-51 (1975). At common law, a writ of certiorari was available when it was "shown that the inferior court or tribunal has exceeded its jurisdiction . . . [or] whenever it is shown that the inferior court or tribunal has proceeded illegally, and no appeal is allowed or other mode provided for reviewing its proceedings." *First Merchs. Nat'l Bank & Trust Co. v. Crowley*, 221 Ind. 682, 685, 50 N.E.2d 918, 919 (1943). After a writ of certiorari is granted by the trial court, the trial court conducts review of the agency decision pursuant to Indiana Code section 4-21.5-5-14. *Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm'n*, 758 N.E.2d 34, 36 (Ind. 2001).

While we have never directly addressed whether a plan commission has authority to appeal from a writ of certiorari and subsequent judicial review, we have addressed related issues before. In *Metropolitan Development Commission of Marion County v. Cullison*, 151 Ind. App. 48, 53, 277 N.E.2d 905, 908 (1972), *reh'g denied*, we held that municipal bodies lack standing to challenge decisions of a board of zoning appeals because they are not an "aggrieved person." Recently, in *Common Council of Michigan City*, 881 N.E.2d at 1014-15, we explained that:

> In the thirty-five years since *Cullison*, neither the General Assembly nor our supreme court have deemed it necessary to 'correct' anything we said in *Cullison*. In fact, our supreme court fairly recently stated, "'[A] party seeking to petition for certiorari on behalf of a community must show some special injury other than that sustained by the community as a whole.'"

Id. (quoting *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind. 2000)). Similarly, I would find that the Chesterton Plan Commission does not have a stake in, and therefore cannot be aggrieved by, its decision to approve a plat. Nor could it suffer special injury from the judicial review of that decision.

The majority holds that we should ignore the requirement that a party have a stake in litigation when the party has been treated as a party before the trial court below, relying upon Indiana Appellate Rule 17(A) and Indiana Code section 34-56-1-1. However, this logic would require us to treat anyone who was treated as a party below as properly before us, ignoring any error on the part of trial court in determining the appropriate parties. This cannot be so. Both Indiana Appellate Rule 17(A) and Indiana Code section 34-56-1-1 must be read to provide party status on appeal to any *appropriate* parties before the trial court.

Further, the majority concludes that standing is conferred by Indiana Code section 36-7-4-1014, which provides:

> (a) The plan commission or any enforcement official designated in the zoning ordinance may bring an action in the circuit or superior court of the county to invoke any legal, equitable, or special remedy for the enforcement of this chapter or any ordinance adopted or action taken under this chapter.
>
> (b) The plan commission or any enforcement official designated in the zoning ordinance may also bring an action in the circuit or superior court of the county to enforce:
>
> (1) conditions imposed under this chapter;

> (2) covenants made in connection with a subdivision plat, a development plan, or a PUD district ordinance (as defined in section 1503 of this chapter); or
> (3) commitments made in accordance with this chapter.

However, my reading of this statute is that an area plan commission may bring an action when it is acting in its enforcement role; a proceeding much different from a *writ of certiorari*. Here, the proceeding before the trial court was a judicial review of the Chesterton Plan Commission's action as a quasi-judicial official. When a plan commission determines whether a plat, replat, or amendment to a plat should be approved, it does so as a disinterested third party. Therefore, it should not be advocating on behalf of either the applicant or remonstrators in subsequent proceedings reviewing its decision.

For these reasons, I would conclude that the Chesterton Plan Commission does not have standing to participate in the judicial review of its own decision.